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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 419

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

E. C. ATKINS AND COMPANY,
Respondent.

BRIEF OF RESPONDENT, E. C. ATKINS AND COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Filed December 10, 1946.

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The Respondent, E. C. ATKINS AND COMPANY, respectfully prays that the petition of the National Labor Relations Board for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Seventh Circuit, entered on May 31, 1946 (*Atkins*, R. 322) be denied.

CORRECTED "QUESTIONS PRESENTED."

In place of the single question said to be presented by the *Atkins* case, on page 3 of the petition, there are actually two questions:

1. Are Auxiliary Military Police of the Army of the United States "employees" of Respondent within the meaning Section 2(3) of the National Labor Relations Act when:

(a) they never worked for Respondent in any other capacity;

(b) they were required by the Army of the United States to be enrolled to protect the plant internally and externally against *sabotage, espionage* and natural hazards, and *to serve with the Army* in time of disaster, internal disorders, *enemy action by air raid, fifth column activity, paratroop attack* or *invasion;*

(c) they were required to wear insignia prescribed by the Army because "by wearing such insignia or marks members serving with the Army will be recognized as *legitimate troops*" (Resp. Ex. 4, *Atkins*, R. 110);

(d) they are interviewed by Respondent, but are employed only when they are inducted, after investigation and approval by the Army, and after taking an oath of allegiance to the United States, agreeing to obey the orders of duly authorized officers, hearing the Articles of War read, and subjecting themselves to military law;

(e) they continue to be members of the Auxiliary Military Police until their resignations or dismissals are approved by competent military authority; the extreme authority of Respondent being to recommend dismissal, and to suspend without pay pending action on the recommendation;

(f) they receive all of their orders and instructions from the Army, such orders and instructions being received by the Chief Guard, and communicated by him to the individual guards;

(g) the Army has the right to exercise, and did exercise, complete control and direction over the manner and means in which they perform their duties;

(h) they are paid by checks of Respondent, which pays them because it is required to do so by the government.

2. If, under the facts set forth in question 1, such Auxiliary Military Police are "employees," was it, in December, 1943, inimical to the public welfare to require Respondent to bargain collectively with the representative of the majority of such Auxiliary Military Police with respect to rates of pay, wages, hours, and other conditions of employment?

The petition states the sole question to be as follows:

> "The question presented by the *Atkins* case is whether persons who are employed to guard the property of a private employer, who are compensated by that private employer at rates fixed by him, and who are also civilian auxiliaries to the military police of the Army of the United States, are 'employees' within the meaning of Section 2(3) of the National Labor Relations Act." (Petition, p. 3.)

The statements of fact contained in the question presented by the Board in the petition are not supported by the evidence. The evidence requires a finding that the facts were as stated in the first of the two corrected questions stated above.

The two chief errors in the Board's version of the question are (a) the statement that these persons "are employed to guard the property of a private employer"; and (b) the statement that they "are *also* civilian auxiliaries to the military police of the Army of the United States."

The fundamental error in these two statements is one which permeates the whole petition. It is a failure to understand the origin of the Auxiliary Military Police at the

Atkins plants and their mission and purpose. The Board assumes in its petition that these guards had been employees (not militarized) of Respondent; that as such they were "employees" within the meaning of Section 2(3) of the Act; that militarization was a status superimposed upon an existing employee relationship; and that the question is whether the addition of militarization deprives such guards of their pre-existing status as "employees."

There is no foundation in the evidence for this erroneous assumption. Yet the entire petition is founded upon it; and it is only this error which explains the Board's effort to join the *Atkins* and *Jones & Laughlin* cases as though they were similar in their facts.

The facts in the evidence are these: Before Respondent contracted to make armor plate for the Army, there was no plant guard force at the Atkins plant.[1] (*Atkins*, R. 88.) The guard force was established because the Army directed and required that it be done. It was not created as a non-militarized plant guard force employed by Respondent to guard its plant. It was created as a force of Auxiliary Military Police who were enrolled as such by the Army rather than being employed by Respondent. The guards were from their inception Auxiliary Military Police, and existed only because the Army needed them for a military purpose. They were not persons employed to guard private property who were "also" civilian auxiliaries to the military police. The implication of the word "also" of a military status added to an existing nonmilitary guard force is unsupported and contradicted by the evidence.

All of the evidence as to the purpose of the Auxiliary Military Police denies the description of them as "persons who are employed to guard the property of a private em-

1. Previously Respondent had four watchmen who occupied "pensioners' jobs"; were "employees"; but were not part of a plant guard force. (*Atkins*, R. 88; Atkins, Stip. p. 2.)

ployer." The War Department prescribed the mission of the Auxiliary Military Police as follows:

> "6. The mission of a guard force of Auxiliary Military Police is:
>
> (a) To provide interior and exterior protection of the plant against *sabotage* and *espionage* and natural hazards.
>
> (b) To *serve with the Army* in providing the protection to the plant and its environs in emergency situations.
>
> 7. An emergency situation in which the Auxiliary Military Police may be called upon for military service may arise from flood, conflagration, or other disaster; internal disorders hazardous to property or production important to the prosecution of the war; *protection from air raid; Fifth Column activity; paratroop attack or invasion;* or it may arise from any other condition or circumstances involving the plant or its community." (Resp. Ex. 4, *Atkins*, R. 106; Emphasis supplied.)

The direction to organize these Auxiliary Military Police forces came originally from the President as Commander-in-Chief:

> "1. Executive Order No. 8972, dated December 12, 1941, authorizes the Secretary of War and the Secretary of the Navy, 'to establish and maintain military guards and patrols, and to take other appropriate measures to protect from injury and destruction,' certain strategic premises, materials, and utilities. In accordance therewith the Secretary of War directed the military organization of plant guard forces as Auxiliary Military Police.
>
> 2. These guard forces will be organized as a civilian Auxiliary to the Military Police in all plants producing war material important in the war effort." (Resp. Ex. 4, *Atkins*, R. 105.)

It is not even accurate to say that these Auxiliary Military Police guarded solely private property. The Fall Creek Ordnance Plant was constructed by, and was the

property of, the United States (*Atkins*, R. 86, *Atkins*, Stip. p. 3) and the armor plate in both plants was being produced for the Army.

The Board in its petition has completely ignored the second question in this case, although there were two grounds for the judgment of the Seventh Circuit Court of Appeals. These were stated by that Court in its second opinion as follows:

> (1) "We formerly refused to enforce the Board's order on the ground that, since the alleged employees (plant guards) were militarized, they were not employees of respondent within the meaning of § 2(3) of the National Labor Relations Act."
>
> (2) "Alternatively, we held that even if the guards, despite their militarized status, be considered employees of respondent, enforcement of the Board's order 'should not be allowed • • • (because) to do so would be or is likely to be inimical to the public welfare." (*Atkins*, R. 321.)

As to the first ground, the Court said:

> "We have also given this matter further consideration and are of the opinion that our former decision in this respect was correct, and we reaffirm it." (*Atkins*, R. 321.)

As to the second, the Court said:

> "there is no necessity for decision on our part in this respect. This is so for the reason that the latter issue is immaterial in view of our decision that the plant guards were not employees." (*Atkins*, R. 321.)

The judgment of the Court, on May 31, 1946, was expressed as follows:

> "On consideration whereof, it is ordered and adjudged by this Court that the former judgment of this Court in this matter be reinstated for the reasons stated in our former opinion, filed February 27, 1945, and that the Board's motion for enforcement of its order be again denied." (*Atkins*, R. 322.)

CORRECTED "STATEMENT."

Following the usual proceedings under Section 9(c) of the Act, the Board issued a decision and direction of election finding that the plant guards involved were "employees" within the meaning of the Act, that they constituted an appropriate bargaining unit, and that they were entitled to the collective bargaining rights guaranteed by the Act, despite the fact that they were Auxiliary Military Police. (*Atkins*, R. 5-8.) The petitioning union was selected by a majority of the plant guards in the election and was certified by the Board as the representative of the plant guards. (*Atkins*, R. 17.)

Thereafter, in proceedings under Section 10(c) of the Act, the Board issued a decision in which it found that the Respondent had refused to bargain collectively with the certified representative of its plant protection employees, thereby engaging in unfair labor practices within the meaning of Section 8(5) and (1) of the Act. (*Atkins*, R. 30-42.) The Board ordered Respondent to cease and desist from refusing to bargain with the named representative of its plant protection employees; to cease and desist from engaging in any like or related acts or conduct interfering with, restraining or coercing the employees; upon request to bargain collectively with such representative; and to post appropriate notices. (*Atkins*, R. 32-33.)

The evidence relating to the Board's finding that these Auxiliary Military Police were "employees" within the meaning of Section 2(3) of the Act and entitled to exercise the bargaining rights guaranteed thereby may be summarized as follows:

In December 1943, when its refusal to bargain occurred

(*Atkins*, R. 39), Respondent was engaged in the manufacture of saws, tools and armor plate at its so called "main plant" in Indianapolis, Indiana, and of armor plate at the Fall Creek Ordnance Plant also in Indianapolis, Indiana. (*Atkins*, R. 277.) The main plant was owned by Respondent and its products were sold to jobbers, dealers, subcontractors and the United States Government. (*Atkins*, R. 277.) The Fall Creek Ordnance Plant was owned by the United States Government and operated by Respondent. All armor plate was manufactured for the United States Government. (*Atkins*, R. 88, 277; *Atkins*, Stip. p. 3).

Before Respondent began to produce armor plate it had no plant guard force, although it did have four watchmen at the Main Plant who occupied pensioners' jobs and were employees of Respondent. (*Atkins*, R. 88; *Atkins*, Stip. p. 2.) When Respondent entered upon war production the Army required that an Auxiliary Military Police force be established with a strength of sixty-four members covering both plants. (*Atkins*, R. 88-89.) Except for the four men who had been watchmen, none of the Auxiliary Military Police had ever been employed by Respondent before they became such Auxiliary Military Police.

The War Department described the purpose of the Auxiliary Military Police as follows:

> "The purpose of organizing the plant guard force is to increase the authority, efficiency, and responsibility of the guard forces at plants important to the prosecution of the war, and through military training to provide auxiliary forces throughout the United States *to supplement the Army* in wartime emergency situations." (Resp. Ex. 4, *Atkins*, R. 105-106, Emphasis supplied.)

It described their mission in these terms:

> "6. The mission of a guard force of Auxiliary Military Police is:

(a) To provide interior and exterior protection of the plant against *sabotage* and *espionage* and natural hazards.

(b) To *serve with the Army* in providing the protection to the plant and its environs in emergency situations.

7. An emergency situation in which the Auxiliary Military Police may be called upon for military service may arise from flood, conflagration, or other disaster; internal disorders hazardous to property or production important to the prosecution of the war; *protection from air raid; Fifth Column activity; paratroop attack or invasion;* or it may arise from any other condition or circumstances involving the plant or its community." (Resp. Ex. 4, *Atkins*, R. 106, Emphasis supplied.)

Applicants were enrolled in the Auxiliary Military Police as follows: They filled out application forms in Respondent's personnel office. (*Atkins*, R. 54, 68, 91.) These were submitted with the recommendation of Respondent to the Army (*Atkins*, R. 92.) The Army made an independent investigation of the applicant, who was enrolled only upon the Army's approval. (*Atkins*, R. 68, 71, 92). This was in accordance with the applicable War Department regulation:

" A member of the Auxiliary Military Police may not be employed, dismissed, or may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto." (Resp. Ex. 4, *Atkins*, R. 109.)

At the time a guard was enrolled, he was required to make, in writing and orally, an oath of allegiance to the Constitution, an agreement to obey any orders issued in connection therewith by the President, as Commander-in-Chief of the Army and Navy of the United States, and by his duly authorized officers, and an acknowledgment that

the appropriate Articles of War had been read and explained to him and that he was subject to military law. (Resp. Ex. 2, *Atkins*, R. 103-104, 54, 56 and 57.) This was required by the Army regulations. (Resp. Ex. 4, *Atkins*, R. 105.)

Each guard was issued an Auxiliary Military Police identification card by the Army (Resp. Ex. 3, *Atkins*, R. 104, 55, 69) which was not carried by Respondent's employees. (Atkins, R. 91.)

Auxiliary Military Police were subject to the Articles of War, especially Articles 58 (desertion), 61 (absence without leave), 62 (disrespect toward the President, Vice-President, Congress, Secretary of War, Governors and Legislatures), 63 (disrespect toward superior officer), 64 (assaulting or willfully disobeying superior officer), 66 (mutiny or sedition), 68 (quarrels, frays and disorders), 69-74 (arrest and confinement), 76 (subordinates compelling commander to surrender), 81 (relieving, corresponding with or aiding the enemy), 82 (spies), 83 (military property), 85 (drunk on duty), 88 (intimidation of persons bringing provisions), 89 (good order to be maintained and wrongs redressed), 90 (provoking speeches or gestures), 92 (murder and rape), 93 (various crimes), 94 (frauds against the government), 96 (general article), 104 (disciplinary powers of commanding officers), and 105 (redress of injuries to property). These are specified in the Army regulations (Resp. Ex. 4, *Atkins*, R. 106) and appear verbatim in the Record. (Resp. Ex. 9, *Atkins*, R. 117-155.)

Only the Army could terminate the tenure of a member of the Auxiliary Military Police. The authority of Respondent was limited to suspension pending action on a recommendation of dismissal.

> "25. A member of the Auxiliary Military Police may not be employed, dismissed, or may not resign if the plant guard officer or other responsible Army rep-

resentative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto. Inasmuch as the guards are under oath to the Army, the plant management may suspend a guard without pay pending approval of his dismissal by the District Plant Guard Officer and pending the termination of the guard's enrollment as a member of the Auxiliary Military Police." (Resp. Ex. 4, *Atkins*, R. 109.)

This was so in practice as well as in the regulations:

"Q. Whenever a man is discharged from the Military Police, who discharges him, the personnel office at E. C. Atkins and Compay or the Military?

A. The Military discharges him from the Auxiliary Military Police. Now there is one thing that should be said there. He can be relieved of his duty temporarily by myself or by E. C. Atkins and Company, problematically for breaking some rule or otherwise proving that he is not doing his duty; he could be relieved temporarily but he could not be discharged by E. C. Atkins and Company." (*Atkins*, R. 72.)

Q. Do you have the right to recommend them for promotion or discharge? Do you do that?

A. I recommend a man for discharge but I don't discharge him myself.

Q. You have the right to recommend him for discharge?

A. Yes, sir.

Trial Examiner Shroyer: While on the subject, to whom do you recommend?

The Witness: To Capt. Wetenhall, Cincinnati, who does the discharging.

Trial Examiner Shroyer: Who issues these two different types of terminations?

The Witness: He does; he issues those." (*Atkins*, R. 81.) (See also *Atkins*, R. 84, 89.)

The Army regulations provided some authority to plant management as to hiring and firing, where there was *a pre-existing plant guard force:*

24. Basically the militarization of the plant guard forces does not change the *existing* systems of hiring, compensation, and dismissal *except as stated in paragraph 25*. All remain, primarily, a matter between the guards and plant management. Guards in the employ of a private employer may, *as heretofore*, be dismissed and those who were Civil Service employees in the employ of the War Department may be dismissed by the local commanding officer, in accordance with Civil Service Regulations. In neither case is a Court Martial necessary." (Resp. Ex. 4, *Atkins*, R. 109, Emphasis supplied.)

(Paragraph 25 has been quoted *supra*).

Of course, paragraph 24 does not apply to Respondent, for Respondent had no plant guard force before the Army installed Auxiliary Military Police, so there was no "existing system" and there was no precedent for dismissing "as heretofore."

Respondent paid the wages of the Auxiliary Military Police. (*Atkins*, R. 82, 85) because "the Government makes them pay" (*Atkins*, R. 82) and made the necessary payroll deductions. (*Atkins*, R. 85.) There is no other evidence about where the ultimate burden of that payment fell. Respondent's counsel stated in argument before the Board "we do not operate on a cost-plus basis". (*Atkins*, R. 333.) But in that same argument he stated:

> "when you realize that the company is merely a conduit of that pay, made to pay it as a result of the contracts of the government, contracts which it was impossible to introduce in evidence because of the confidential nature of the product covered thereby. It will be seen that it is merely a technical incident and that in substance if is the government which is the paymaster of these troops." (*Atkins*, R. 332.)

The Army regulations contained the following provision, which obviously referred to plant guard forces which had

not originated as Auxiliary Military Police, and which therefore did not apply to this case:

> "27. The status of the employer in regard to the employee benefits for the guard force *is not changed.* For example, Social Security, Workmen's Compensation, Employer's Liability and vacation schedules *remain* unaffected. Employers should have a clear understanding with their insurance companies concerned." (Resp. Ex. 4, *Atkins*, R. 110, Emphasis supplied.)

The Auxiliary Military Police were armed (Atkins, R. 78) as they were required by the regulations to be. (Resp. Ex. 4, *Atkins*, R. 110.) They were required to wear distinctive insignia because:

> "By wearing such insignia or marks, members, serving with the Army, *will be recognized as legitimate troops* and not deemed irregulars or guerillas." (Resp. Ex. 4, *Atkins*, R. 110, Emphasis supplied.)

They were authorized to wear service stripes which "will be in accordance with Army Regulations" (Resp. Ex. 4, *Atkins*, R. 110) and "such decorations, service medals, ribbons, and badges as are authorized for wear on the United States Army service uniform". (Resp. Ex. 4, *Atkins*, R. 110.)

It is uncontradicted in the evidence that the Army had the right to exercise, and did exercise, complete control and direction over the manner and means in which the Auxiliary Military Police performed their duties. This was done through Captain Wetenhall, the Fifth Service Command, District Plant Guard Officer, Lieutenant Scanlon, his assistant, and Chief Johnston, of the Auxiliary Militar Police.

Chief Johnston had never been an employee of Respondent. (*Atkins*, R. 68.) He was enrolled directly in

the Auxiliary Military Police (*Atkins*, R. 68) as Chief (*Atkins*, R. 71).

The Auxiliary Military Police Chief received his orders from the Army (*Atkins*, R. 73, 83), was inspected by them, and could be removed from his authority by the Army (*Atkins*, R. 82.) He received no orders or instructions from Respondent and was not responsible or answerable to Respondent. (*Atkins*, R. 75, 78, 80, 82.)

> "Q. Do any of the Military Police under your command take any orders from any officer, director, or agent of the Atkins company as such?
>
> A. No; they wouldn't take any orders. Just like myself, they would cooperate in any way they could, but they would only—
>
> Q. Suppose such cooperation involved deviation from such specific order which you had to give. Would they follow your specific order or would they cooperate?
>
> A. They would—that would be their orders—to follow mine; yes, sir." (*Atkins*, R. 78.)

Chief Johnston worked "very closely" with Respondent's personnel director and testified that "I try to cooperate to the best of my ability and he does the same for me" (*Atkins*, R. 75) but he had never taken an order from the personnel director.

Chief Johnston, on his own authority, rotated the shifts of the Auxiliary Military Police, contrary to Respondent's system. (*Atkins*, R. 78-79.) He promoted members of Auxiliary Military Police to the rank of lieutenant without prior consultation, upon his own final authority, later notifying Respondent of their new rank. (*Atkins*, R. 82.)

Auxiliary Military Police were required to salute all Army officers. (Resp. Ex. 11, *Atkins*, R. 157.) This was enforced, and a guard was reprimanded by Captain Wetenhall for failure to salute him. (*Atkins*, R. 75.)

The *evidence* contains nothing directly on the subject of collective bargaining rights. The petition (pp. 12-13) refers to a War Department circular which is printed in Appendix B of the petition and which contains the statement "Auxiliary Military Police are permitted to bargain collectively, but no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police." (Petition, App. B. p. 58.) This circular is not part of the record in this case, and there is nothing to indicate that either Respondent or the Auxiliary Military Police themselves had ever heard of it. The Board's failure to introduce it in evidence or refer to it in its decisions indicates that the Board had never heard of it either.

The union seeking to represent the Auxiliary Military Police was not the same union which represented the production and maintenance employees. (*Atkins*, R. 85-88.)

The Board found that the Auxiliary Military Police were "employees" of Respondent, that they were entitled to the collective bargaining rights under the Act, and that Respondent had committed an unfair labor practice, and ordered Respondent to bargain collectively with the union representing them. (*Atkins*, R. 31-32.)

The Circuit Court of Appeals for the Seventh Circuit denied the Board's petition for enforcement upon two grounds (*Atkins*, R. 348-366) which it later summarized as follows:

> 1. "We formerly refused to enforce the Board's order on the ground that, since the alleged employees (plant guards) were militarized, they were not employees of respondent within the meaning of § 2(3) of the National Labor Relations Act."
>
> 2. "Alternatively, we held that even if the guards, despite their militarized status, be considered

employees of respondent, enforcement of the Board's order 'should not be allowed * * *' (because) 'to do so would be or is likely to be inimical to the public welfare.'" (*Atkins*, R. 321.)

The Board petitioned for a writ of certiorari (No. 1238, October Term, 1944). In that petition the Board stated (as was not in the record) that the guards had been demilitarized and were no longer Auxiliary Military Police, but urged that this did not render the case moot. On June 4, 1945, this Court entered the following order:

> "*Per Curiam:* The petition for writs of certiorari is granted. The judgments are vacated and the cases are remanded to the respective United States Circuit Courts of Appeals for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved, and the effect thereof on the Board's orders." (325 U. S. 838.)

The Board and Respondent then entered into stipulations as to the alleged changed circumstances with respect to demilitarization. The Board filed with the Circuit Court of Appeals for the Seventh Circuit a motion for a decree enforcing its order. This was denied by that Court in the following terms:

> "We have considered the facts relative to the changed status of the plant guards by reason of their demilitarization and are of the opinion that they are irrelevant to the issues which we have heretofore decided adversely to the Board. Certainly such is the case with reference to our decision that the plant guards were not employees of respondent within the meaning of the Act. In fact, the irrelevancy of the changed circumstances as to this issue is conceded by the Board. We are urged by the Board, however, to reverse our former decision and to hold that the plant guards were employees. We have also given this matter further consideration and are of the

opinion that our former decision in this respect was correct, and we reaffirm it.

"Although we are doubtful that the facts concerning the demilitarization of the plant guards and their changed status as a result thereof are material to our alternative holding that the enforcement of the Board's order 'would be or is likely to be inimical to the public welfare,' there is no necessity for decision on our part in this respect. This is so for the reason that the latter issue is immaterial in view of our decision that the plant guards were not employees." (*Atkins*, R. 321.)

That Court reinstated its former judgment for the reasons stated in its former opinion. (*Atkins*, R. 322.)

ARGUMENT.

With respect to the *Atkins* case, the Board offers two reasons for granting the writ:

> *First*, "The decision of the Circuit Court of Appeals for the Seventh Circuit in the *Atkins* case, holding that militarized guards are not 'employees' within the meaning of the Act (*Atkins*, R. 321, 364), conflicts with the holding of the Circuit Court of Appeals for the Sixth Circuit in the *Jones & Laughlin* case that such persons are 'employees * * * entitled to the protection of the Act' (*Jones*, R. 84-85, 121)." (Petition, p. 21.)
>
> *Second*, "The questions raised by these cases are important for, if the decisions below stand, they overturn a Board policy which for a period of years has effected stable conditions in a large and difficult area of labor relations." (Petition, p. 36.)

It is submitted that neither ground for issuing a writ of certiorari exists in the *Atkins* case.

1. There Is No Conflict Because the Holding in the Atkins Case That Those Auxiliary Military Police Were Not "Employees" of Respondent Resulted From a State of Facts Unlike That in the Jones & Laughlin Case.

It is settled that a conflict between decisions of circuit courts of appeals is not a reason for granting review on writ of certiorari where the asserted conflict arises from differences in states of fact and not in the application of a principle of law. Thus in *Wisconsin Electric Co.* v. *Dunmore Company*, 282 U. S. 813, this Court's order read:

> "*Per Curiam:* It appearing that the asserted conflict in decisions arises from differences in states of

> fact, and not in the application of a principle of law, the writ of certiorari is dismissed as improvidently granted."

To the same effect is *Layne & Bowler Corporation* v. *Western Well Works, Inc.*, 261 U. S. 387.

The rule is stated in *The Business of the Supreme Court at October Term, 1933*, Frankfurter and Hart, 48 Harvard LR 238, 268:

> "The Court is interested in conflicts which impair uniformity of decision where uniformity is significant, conflicts which its decision in the particular case will remove. This rules out, of course, hosts of particularistic applications of general rules turning upon the analysis of special states of fact."

It is also settled that each case must be decided by the Board "upon all the testimony taken" (National Labor Relations Act, Sec. 10(c)) and by the Court only upon the "transcript of the entire record in the proceeding" (National Labor Relations Act, Sec. 10(e)).

> *NLRB* v. *Newport News Shipbuilding and Dry Dock Co.*, 308 U. S. 241.

In its attempt to show that the *Atkins* and *Jones & Laughlin* decisions were essentially similar in their facts, and thus conflicting in their holdings, the Board has ignored the records in both cases. The Board has relied upon an Army Service Forces circular (Appendix B of Petition) which does not appear in the record of either case, which is not shown to have been known to Respondent, the Auxiliary Military Police or the Board at the time of the Board's decision. The Board has further relied upon facts which it asserts exist "in the 'typical' plant guard cases" (Petition, p. 24) and upon the assertion that "the Board has recognized the 'militarized plant guard' as an employee-

category which does not vary materially from case to case" (Petition, p. 21).

The Circuit Court of Appeals' holding that the Board's findings were not supported by the evidence, was required by the fact that those findings were not based upon the evidence presented in the hearing required by the Act, but upon preconceptions of fact acquired by the Board in other unrelated cases to which Respondent was not a party.

The improper joinder of the *Atkins* and *Jones & Laughlin* cases in the same petition has enabled the Board, in its Statement (Petition, pp. 5-18) to shift from one record to the other in a manner implying that the same facts exist in both, and to supply large gaps in both records by citations of the material in Appendix B of the petition which was not in either record.

The facts in the *Atkins* case, as shown by the *Atkins* record, have been stated herein (*supra*, pp. 7-16). A comparison of those facts with the facts in the *Jones & Laughlin* record reveals the following vital differences of fact:

(a) The *Jones & Laughlin* plant guard force existed before the war. All of the indicia of the employment relation were present: the Company hired, fired, paid and controlled the guards. That guard force was militarized: the Auxiliary Military Police status was superimposed upon an existing employment relation.

The *Atkins* record is entirely different. There was no plant guard force and therefore no pre-existing employment relation. The Auxiliary Military Police force was created by the Army by enrolling men who were not previously employees of Respondent. The Auxiliary Military Police status was not superimposed upon any existing employment relation. The guard force existed only as Auxiliary Military Police.

(b) The *Jones & Laughlin* plant guards were hired by Jones & Laughlin. (Jones, R. 4-14.) The *Atkins* plant guards were hired by the Army which enrolled them as Auxiliary Military Police, Respondent merely taking their applications and recommending them (*supra*, pp. 8-9).

(c) *Jones & Laughlin* could discharge its plant guards. (Jones, R. 9.) The *Atkins* plant guards could not be discharged by Respondent, but only by the Army. Respondent's power was limited to suspending a guard temporarily pending approval or disapproval by the Army of a recommendation for dismissal (*supra*, pp. 10-12).

(d) The *Jones & Laughlin* plant guards were paid by the Company (Jones, R. 9) and there was no evidence that the burden of this pay was shifted to the government. The *Atkins* guards were paid by Respondent, but the evidence was that this was done because the government made Respondent pay. There was no evidence that the burden of this pay remained upon the Respondent, and the record supports a finding that it was borne by the government (*supra*, pp. 12).

(e) The *Jones & Laughlin* record is devoid of any evidence about whether the activities of the plant guards are directed and controlled by the Company or by the Army and about where the lieutenants and captains of that guard force get their orders and instructions. The *Atkins* record leaves no room for doubt that all of the instructions, directions and orders to the Auxiliary Military Police came from the Army, or from their Chief, who himself took no orders or directions from Respondent. (*supra*, pp. 13-14)

(f) The *Jones & Laughlin* record is silent on the subject of hours. The *Atkins* record shows that the hours of the Auxiliary Military Police were set by Chief Johnston, who

was not subject to direction, or actually directed, by Respondent.

In view of the complete differences in the records as to the significant facts, there is no conflict between the holding of the Circuit Court of Appeals for the Seventh Circuit that the guards in the *Atkins* case were not "employees" and the holding of the Circuit Court of Appeals for the Sixth Circuit that the guards in the *Jones & Laughlin* case were "employees" within the meaning of the Act.

2. There Is No Conflict Because the Fact That the Guards Were "Employees" Was Not Disputed in the Jones & Laughlin Case.

Respondent has contended, the Board has denied, and the Circuit Court of Appeals has held, that the guards are not its "employees" in any sense, and that therefore were not within the meaning of the Act.

In the *Jones & Laughlin* case the contention of the Company was simply that the guards acted in the interest of the employer and must be treated like supervisory employees under the Act. That Company did not contend that these guards were not its employees. That fact appears throughout the *Jones & Laughlin* record and was asserted again on page 8 of the brief of Jones & Laughlin when that case was previously before this Court (No. 1237, October Term, 1944):

> "* * * in this case, the Sixth Circuit Court of Appeals agreed with the Board that the Otis Works police were 'employees', as the Company had conceded for the purposes of the case."

Even if the facts in the two cases were the same, and it has been shown that they are dissimilar, a conflict justifying certiorari cannot be founded upon a holding of a Circuit Court of Appeals upon an issue not in dispute in the case.

3. The Circuit Court of Appeals Followed the Hearst Case.

The Circuit Court of Appeals quoted the opinion of this Court in *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111, 130:

> "Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record." (*Atkins*, R. 349.)

It carefully observed this rule in examining the record, and found that the Board's findings were not supported by evidence.

The petition cites two trivial instances of errors which it says the Board made in examining the evidence for support for the Board's findings. Thus the Board says:

> "One glaring example of the error into which the court fell in so doing is its holding that the Atkins Company was a cost-plus-a-fixed-fee contractor whose labor costs were borne by the Government (*Atkins*, R. 355). The record plainly shows that this was not a fact (*Atkins*, R. 31, 332-333, 326-327) and the inferences as to employer-employee relationship drawn from this supposed fact by the court below must, therefore, fall." (Petition, pp. 3-4, footnote 2.)

Actually the Court did not hold that Respondent was a cost-plus-a-fixed-fee contractor. It examined the record, and found no support in the evidence for the Board's finding (*Atkins*, R. 31) that Respondent paid the guards. The Court's statement was as follows:

> "The incident most strongly emphasized is that they were paid by respondent. Undoubtedly, this is the most important incident common to the employer-employee relationship. In the instant case, however, it is, when viewed in connection with the attending circumstances, largely minimized if not entirely ob-

> literated. Payment of these guards by respondent, in fact their employment, was a requirement imposed by the government as a prerequisite to respondent's right to engage in the manufacture of war material. It had no option to pay or not pay; neither did it have any option to employ or not employ. Chief Johnston, when asked why the guards were paid by respondent when their orders were received from the military authorities, stated an incontrovertible fact: 'They pay because the government makes them pay.' It must be assumed, so we think, that respondent was reimbursed by the government for all costs incurred in the manufacture of war material, including that of compensation paid to the guards. In reality, under such circumstances, as bearing upon the employer-employee relationship, we are of the view that it makes no difference whether they were paid by respondent or by the government." (*Atkins*, R. 354-355.)

The record does not, as the Board says in the foregoing footnote, "plainly show that this was not a fact." Its three citations to the record consist of pages 31, 332-333 and 326-327. Page 31 is the Board's own finding. Pages 332-333 and 326-327 are argument of Respondent's attorney before the Board. On page 333 Respondent's attorney states: "We do not operate on a cost-plus basis." On page 332 he stated:

> "when you realize that the company is merely a conduit of that pay, made to pay it as a result of the contracts of the government, contracts which it was impossible to introduce in evidence because of the confidential nature of the product covered thereby, it will be seen that it is merely a technical incident and that in substance it is the government which is the paymaster of these troops."

If this is all the record holds, it cannot be said that the Board's finding is "supported by evidence" as Section 10(e) of the Act requires.

The other instance in which the Board contends that the Circuit Court of Appeals substituted its inference for that of the Board is stated by it as follows:

> "Particularly striking in this respect is the action of the court in substituting for the Board's finding that 'the guards are interviewed for employment by the respondent and not by the United States of America, and are hired by the respondent; * * * their discharge is ordinarily initiated by respondent' (*Atkins*, R. 31; 53-54, 59, 68-72, 81-84, 91-92), and its inference that the authority exercised over these subjects by the military authorities was in the nature of a veto power (*Atkins*, R. 31), the court's own inference that 'the authority to hire and discharge was solely the prerogative of the military' (*Atkins*, R. 357)." (Petition, pp. 23-24, footnote 15.)

A more complete quotation from the Court's opinion will show that it looked for evidence supporting the Board's finding, and discovered that there was none:

> "From what we have shown, we think it is conclusively established that the authority to hire and discharge was solely the prerogative of the military. True, respondent was charged by the government with receiving the application for employment and in making a recommendation. This is the sole support, if it can be characterized as such, found in this record for the Board's finding that respondent was authorized to hire." (*Atkins*, R. 357.)

This was preceded and followed by a careful analysis of the evidence, including many quotations from the record, and then the following statement by the Court:

> "The most favorable possible inference which can be drawn from the record is that respondent's authority, if it had any, with reference to hire and discharge was narrowly limited; in fact, as we have stated, we think it had no right in such matters except that of making recommendations to the military authorities." (*Atkins*, R. 358.)

If these are the only examples of the Court substituting its findings for those of the Board, it is apparent that the standard of the *Hearst* case has been fully met.

The *Hearst* case has also been followed by the Court as to the meaning of the word "employee" as used in the Act. The Court reviewed all of the evidence and found that it did not support a finding that the economic relationship between Respondent and the Auxiliary Military Police was such that the purposes of the Act would be aided by giving the Auxiliary Military Police the protection of the Act. The evidence as to that economic relationship showed that there was no field for collective bargaining open between Respondent and these Auxiliary Military Police. Respondent did not have that "control over the terms and conditions of employment," which the Board applied in its decision as the test of coverage by the Act. (*Atkins*, R. 32.)

4. There Is No Important Issue to Be Decided by This Court.

This case deals with plant guards who are Auxiliary Military Police. There have been no Auxiliary Military Police at Respondent's plant for almost three years. (*Atkins*, Stip. p. 6.) It is assumed that there has been none anywhere at least since Japan surrendered in August 1945. This Court should use as its model its order in *District of Columbia* v. *Sweeney*, 310 U. S. 631, which read:

> "Denied in view of the fact that the tax is laid under a statute which has been repealed and the question is therefore not of public importance."

The Board in its petition (pp. 36-37) contends that if Auxiliary Military Police are held not to be "employees" the Board "may well be required to undertake new proceedings to establish bargaining rights once again for the

now demilitarized plant guards" in 135 cases previously decided by it. Apart from the fact that those cases did not present the issue of whether those guards were employees in any sense, as this case does, but rather were on the issue of whether guards were supervisory employees, it is obvious that the Seventh Circuit Court's decision will not require new proceedings. It can be assumed that those companies have been bargaining as to guards for several years since their unions were certified; and that their guards have not been militarized for several years. Why then should a decision that militarized guards are not employees cause a withdrawal of recognition from a union representing guards who have not been militarized for several years? That is unrealistic. It is particularly so in view of the distinctive facts of the *Atkins* case already described herein (*supra*, pp. 7, 16).

Neither is there any question in this case which is of importance under the Fair Labor Standards Act, the Social Security Act, or the statute and order creating the National War Labor Board. No ruling or decision under the Social Security Act or the related provisions of the Internal Revenue Code by the Social Security Board or the Commissioner of Internal Revenue has been found which holds Auxiliary Military Police to be employees of the person at whose plant they are stationed. The National War Labor Board has long ceased to exist. The only related Fair Labor Standards Act Case was *Walling* v. *Lum*, 7 Wage Hour Reporter 570, 8 Labor Cases 66,268 (S. D. Miss.) which applied, to a set of facts unrelated to those in this case, a standard dissimilar to that which the Board is asking this Court to declare. If the decision in this case were relevant to that one, the basis of decision in that case would be upset as much by adopting the Board's test of employment as by adopting that of the Seventh Circuit Court.

The fact is that the instant case involves different statutory language and a different statutory purpose than appears in those other enactments. A decision as to the interpretation and purpose of the National Labor Relations Act does not upset rulings based upon the language and declared purposes of those other statutes.

Conclusion.

It is respectfully submitted that the petition of the National Labor Relations Board for a writ of certiorari should be denied.

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